

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF &
APPENDIX**

75-2049

Original

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To be Argued by
David A. Spiegel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel.
JOHN SUGGS,

Petitioner-Appellee,

75-2049

-against-

J. EDWIN LA VALLEE,

Respondent-Appellant.

-----X

+ APPENDIX
BRIEF FOR RESPONDENT-APPELLANT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-
Appellant
Two World Trade Center
New York, New York 10047
Tel. (212) 488-7591

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DAVID R. SPIEGEL
Assistant Attorney General
of Counsel

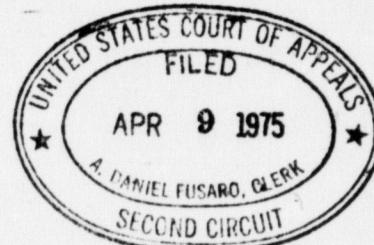


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-against-

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Respondent-Appellant.

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BRIEF FOR RESPONDENT-APPELLANT

Questions Presented

1. Whether the District Court committed reversible error by holding that the 1968 psychiatric report on petitioner invalidated his prior guilty plea and all of the admissions on which it was based?
2. Whether petitioner's pleadings in 1968 and 1969 comport with the standards set forth in the applicable case law?
3. Whether, at the very least, respondent was entitled to an evidentiary hearing below?

4. Whether petitioner was entitled to a new competency hearing prior to his 1969 plea ratification and sentencing?

Statement

In this habeas corpus proceeding, Superintendent J. Edwin LaVallee,* appeals from a decision of the United States District Court for the Southern District of New York (Duffy, J.) filed February 25, 1975, which ordered that a writ of habeas corpus issue to petitioner within 60 days of the date of the opinion unless by that time petitioner was permitted to replead in state court upon the indictments in question. The court premised its order on a finding, made without an evidentiary hearing, that petitioner's plea to multi-count robbery and rape indictments failed to comply with the standard set forth in Boykin v. Alabama, 395 U.S. 238 (1969).

In an order dated March 29, 1975 the District Court stayed its decision pending the taking of an expedited appeal by respondent. Such an appeal was permitted by this Court in an order dated March 27, 1975.

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* Although J. Edwin LaVallee is named as the respondent herein, he actually no longer has custody of Suggs; petitioner is presently confined at Great Eastern Correctional Facility. He is scheduled to meet with his parole board in July, 1975 and could obtain his release at that time.

Facts

In an 18-count indictment filed July 30, 1968, petitioner was charged by the New York County Grand Jury with various counts of rape in the first degree, sodomy in the first degree, robbery in the first degree, and possession of a weapon. In a separate indictment, he was charged with additional counts of robbery.

On September 13, 1968, petitioner, represented by Legal Aid, appeared in Supreme Court, New York County, for the purposes of pleading to the indictment. Petitioner, through counsel, withdrew his prior plea of not guilty and offered to plead guilty to one count of rape in the first degree and one count of robbery in the first degree, in satisfaction of the indictments. The prosecutor offered no opposition to the proffered plea.

Before accepting his plea, the Court (Nunez, J.) entered into a colloquy with petitioner as to his understanding of the plea, and as to whether or not there was a factual basis for the plea. Making detailed and explicit responses and even volunteering information, petitioner admitted to the specific factual elements involved in his crimes. The pertinent exchanges read as follows:

"THE COURT: Did you hear the district attorney tell me that with reference to the rape case it is the People's claim that on May 24, 1968, at about 8:35 p.m. you had sexual intercourse with a woman whose name was Doris A. Mohit and you had this relation with her against her will and by use of force? And he said that this is stated -- it is alleged to have taken place in a building on Hamilton Avenue and 139th Street on that day? Did you do that?

THE DEFENDANT: Yes, sir.

THE COURT: What did you do with this woman?

THE DEFENDANT: I took her up to the top floor.

THE COURT: Had you seen this woman before at all?

THE DEFENDANT: No, sir.

THE COURT: Where did you pick her up or where did you get ahold of her?

THE DEFENDANT: Coming off Amsterdam.

THE COURT: Coming off Amsterdam?

THE DEFENDANT: Yes.

THE COURT: Was it dark on this day?

THE DEFENDANT: Yes, sir.

THE COURT: Of course, you are not married to her?

THE DEFENDANT: No, sir.

THE COURT: You had never seen her before?

THE DEFENDANT: No, sir.

THE COURT: And what did you do? How did you get her to go up there?

THE DEFENDANT: Told her if she didn't go up there I would blow her head off.

(Plea Minutes, 10-11)*

* * *

THE COURT: Why did you attack her?

THE DEFENDANT: I just had it in mind.

THE COURT: You just had it in your mind?

THE DEFENDANT: Yes, sir.

THE COURT: About how old a person was thos lady?

THE DEFENDANT: About thirty-six.

THE COURT: Did you hear the district attorney say that on April 30th, 1968, at about 7:40 p.m. on 136th Street between Amsterdam and Broadway, here in Manhattan, that you had a knife in your hand and that you stole a purse containing the sum of eight dollars from a lady whose name is Eleanor Evans? Did you hear him say that?

THE DEFENDANT: Yes, sir.

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* The Plea Minutes will be hereafter cited by the letter "P" followed by the appropriate page number; the Sentencing Minutes will be cited by the letter "S" followed by the appropriate page number.

THE COURT: Did you threaten the lady with a knife if she didn't give you the money?

THE DEFENDANT: Yes, sir.

THE COURT: Had you ever seen this lady before in your life?

THE DEFENDANT: No, sir.

THE COURT: How old a lady was she, about?

THE DEFENDANT: About thirty-nine, forty.
(P. 12-13)

Petitioner then indicated that he was entering the pleas of his own free will:

THE COURT: Are you entering these two pleas of guilt voluntarily?

THE DEFENDANT: Yes, sir.

THE COURT: And are you entering these pleas of guilt because you did rape this girl on May 24th, 1968, and because you did rob this lady of her pocketbook on April 30th, 1968? Is that why you are entering the pleas?

THE DEFENDANT: Yes, sir.

THE COURT: And for no other reason?

THE DEFENDANT: No other reason.
(P. 16)

In the course of its colloquy with petitioner, the Court inquired of him whether or not he felt any remorse about his acts. Petitioner replied that he did not feel sorry about

anything; that, in petitioner's words, "[i]f I did something and I did it there is nothing to be sorry about after I do it" (P. 17). Petitioner further said that it did not matter what he did, there was still nothing to be sorry about (P. 17-18).

Apparently because of petitioner's total absence of remorse and because it thought that he had not already had a psychiatric examination, the Court ordered, sua sponte, that petitioner be committed to Bellevue for a psychiatric examination and report (P. 20-21). However, it was understood -- indeed, it was stated by petitioner's own counsel -- that this report was for sentencing purposes only (P. 20).

On October 21, 1968, the Bellevue report was completed and, pursuant to the provisions of the Code of Criminal Procedure, transmitted to the Court. The report, in summary, found petitioner to be a paranoid type schizophrenic and that consequently, he was then in such a state of insanity as to be incapable of understanding the charge, proceedings or of making his defense. Interestingly, although nothing that petitioner was not denying complicity for the crimes with which he was charged, the two psychiatrists who signed the report observed that petitioner had contradictorily implied to other members of the Bellevue staff that he had indeed committed the crimes and

had done so in order that he "be treated with the respect due such a fearsome figure" (e.g., petitioner).

The Bellevue report was directly contradicted by another report done independently on Suggs on July 23, 1968. This report concluded that he was without psychosis. However, neither the Bellevue psychiatrists nor Justice Nunez appear to have been aware of this earlier report.*

Pursuant to the former New York Code of Criminal Procedure § 662-b, the Court, on November 6, 1968, without a hearing, ** found petitioner incapable of standing trial and ordered him committed to the custody of the State Department of Mental Hygiene.

On April 4, 1969, a report was transmitted by the Superintendent of Matteawan State Hospital to the Court. After a review of petitioner's history, the Superintendent noted that because of treatment with psychotropic drugs petitioner's "mental condition gradually improved and he made a good adjustment

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* Both this report and another one made subsequently on May 30, 1969 were missing from petitioner's records on file in the New York County Supreme Court. They were located by the Psychiatric Clinic of the Supreme Court on April 1, 1975, following an exhaustive search of that unit's closed files. This was too late for them to be submitted in the District Court. Accordingly, a motion to make them part of the record has not been made in this Court.

** In papers submitted below this office erroneously indicated that a hearing had been held prior to the signing of the commitment order. In fact, the commitment order itself indicates that it was signed without a hearing.

to our institution program". The letter went on to note:

"At a recent examination to our medical staff, patient was attentive and cooperative toward the examiner and was able to give a coherent and relevant account of the events leading to his arrest for the alleged criminal offense." (emphasis added)

Accordingly, the letter concluded that petitioner was no longer in such a state of idiocy, imbecility or insanity as to be incapable of understanding the charge of making a defense thereto.

On April 30, 1969, petitioner was returned to New York County Supreme Court for sentencing before a different new judge other than the one who had taken his plea (^{VIZ.} Justice Schweitzer). However, because of his counsel's request for a new psychiatric examination, the sentencing date was adjourned.

The psychiatric examination, held on or about May 20, 1969, found that petitioner was competent. Subsequently, on June 6, 1969, petitioner again appeared for sentencing with assigned counsel.* When asked if he had any legal cause why judgment should not be pronounced, petitioner replied that he did -- that at the time he entered his 1968 plea he "wasn't capable of understanding the case". (S. 2) However, it was then

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* While the minutes of the court indicated July 3, 1968 as the sentencing date, the District Attorney's brief to the Appellate Division in the appeal from the conviction indicates that the sentencing actually occurred on June 6, 1969. Both petitioner and the court below have accepted the earlier date as the correct one.

conceded that this claim had already been brought to the attention of the court in the context of a purported application to withdraw petitioner's plea and that two days previously, in an off-the-record conference with the court, petitioner had decided to withdraw the application and enter his plea (S. 3). Petitioner himself then conceded that he had no legal cause to show why judgment should not be pronounced on him and that he wished to have sentence imposed (S. 4-5). He specifically rejected an offer by the Court to adjourn the sentencing in order to give him further time to reconsider his action (S. 4).

After hearing petitioner's argument on mitigation, the Court sentenced him to a period of five to fifteen years on each count, the sentences to run concurrently (S. 7-8).

Petitioner appealed to the Appellate Division, First Department which, on October 13, 1970, affirmed the conviction without opinion. People v. Suggs, 35 A D 2d 781. On November 6, 1970, petitioner was denied leave to appeal to the Court of Appeals.

Prior Proceedings

The present proceeding was brought on by petitioner's pro se application dated October 13, 1972. Petitioner asserted in essence that the state court, prior to his 1969 sentencing, should have ordered sua sponte a competency hearing.

On June 5, 1973, petitioner's present counsel was assigned. On July 19, 1973, because petitioner's counsel wished to raise an additional Boykin claim which had not been previously raised in the state courts in compliance with the exhaustion requirement of 28 U.S.C. 2254(d), the case, by stipulation, was placed on the suspense calendar.

Thereafore, petitioner raised his present Boykin claim by motion to vacate judgment in New York County Supreme Court (Sandifer, J.).

The claim was denied in a memorandum opinion dated December 6, 1973.

The Court found the facts in Suggs' case plainly distinguished it from the ambit of the Boykin holding. Having read the 1969 sentencing minutes and the various records pertinent thereto, Judge Sandifer concluded that:

"the court [the 1969 sentencing court] had afforded defendant's counsel an opportunity to familiarize himself with his client's desire to withdraw his previously entered guilty pleas, and ... the defendant at a time when his competency had been attested to by qualified psychiatrists. . . categorically indicated that he 'wanted to accept the sentence in this case'." (Pet's. Exh. I, p. 2, emphasis added).

By contrast, in Boykin "so far as the record shows, the judge asked no questions of petitioner concerning his plea, and petitioner did not address the court". See the Boykin case, 395 U.S. at 239, as referred to at p. 3 in Judge Sandifer's opinion.

Moreover, Judge Sandifer's reading of the 1969 guilty plea minutes revealed that:

"while Judge Nunez [the plea judge] apparently felt that defendant needed help [e.g., psychiatric help]. . . he apparently did not question the defendant's sanity at this time nor does the record disclose that his attorney raised this issue" (Pet's. Exh. I, p. 2).

Understandably, given these circumstances, Judge Sandifer concluded that even under the stringent Boykin standard the evidence was "overwhelming" that defendant had "knowingly, intelligently, and voluntarily" entered his plea (Exh. I, p. 3).

On March 5, 1974, petitioner's request for leave to appeal to the Appellate Division, First Department was denied.

Thereafter, on April 30, 1974 the District Court, upon application by petitioner, removed the case from the suspense calendar.

Decision Below

In a decision dated February 25, 1975 the District Court indicated that it agreed with petitioner's Boykin claim and that, accordingly, it would grant his application for habeas corpus relief.

The Court reasoned that petitioner's 1968 plea was "conclusively invalidated" by the court-ordered psychiatric report attesting to Suggs' incompetency (Appendix "B", p. 10). Thus at the time of petitioner's sentencing, despite his statements that he wished to ratify his earlier plea, the court was obliged to treat Suggs as if he were pleading de novo and conduct a "full and complete inquiry" into the voluntariness of the plea along the guidelines set forth in Boykin v. Alabama, 395 U.S. 238, 242 (1969), a case decided four days prior to the time defendant was sentenced (Appendix "B", p. 15). The Court thus concluded:

"Applying these principles to the instant facts, it is manifest that no such inquiry was to the voluntariness of the ratification, the plea itself, or any factual inquiry was made of the defendant at the time of sentencing. Thus if the 1968 plea is deemed a nullity by virtue of defendant's incompetence, the court must look to the sentencing minutes, which are utterly inadequate to make any finding of waiver of rights, pursuant to Boykin."
(Appendix "B", p. 15).

The District Court further suggested that the Boykin requirement of an "intelligent and voluntary" waiver (id. 395 U.S. at 242) required an explicit waiver of three constitutional rights -- the privilege against self-incrimination, the right to trial by jury, and the right to confront one's accusers (Appendix "B", 11-12, referring to Boykin, 395 U.S. at 243). However, it was conceded that this explicitness criteria had been rejected by a number of circuit courts, and had never actually been decided by this Court (Appendix "B", 11-12).

Judge Duffy also noted that because there was a "virtually non-existent record", a federal evidentiary hearing "would be an exercise in futility" (Appendix "B", p. 16).

Finally, the Court rejected petitioner's claim, advanced in his initial, pro se papers, that the sentencing court, sua sponte, should have granted him a competency hearing. The Court

observed that "Upon careful scrunity of the record as well as petitioner's failure to particularize in what why he was prejudiced", it was clear that the court's omission was "well within the proper exercise of its discretion" (Appendix "B", p. 17).

POINT I

THE LOWER COURT DECISION IS
CLEARLY ERRONEOUS IN THAT IT
INVOLVES A GROSS MISINTERPRE-
TATION OF THE APPLICABLE FACTS
AND CASE LAW.

The lower court's decision is premissed essentially on a belief that all of petitioner's statements at the time of his 1968 plea were nullified by his subsequent psychiatric examination and therefore carry no legal force whatsoever (Appendix "B", p. 15). However, as well shall indicate infra, Parts A and B, such a conclusion involves a gross misconstruction of the plain meaning of the record. Even if petitioner was incompetent at the time of his plea -- a conclusion which we by no means agree with -- his subsequent statements at his 1969 sentencing that he wished to ratify his earlier remarks, clearly remove any doubts as to the invalidity of his plea. Indeed, in view of these remarks the present proceeding constitutes nothing more than a cynical, opportunistic attempt to reopen a conviction at a time when it is clear that the People would have a difficult

if not impossible time in locating and producing the same witnesses that were readily available and prepared to testify at the time petitioner willingly renounced his rights.

A. The 1968 psychiatric report did not negate petitioner's earlier plea.

The minutes of petitioner's September 13, 1968 plea clearly indicate that the psychiatric report was ordered not because of any doubts as to petitioner's competency to enter his plea or to understand the proceedings against him, but, rather, because of a belief by the Court and petitioner's then attorney, that in view of petitioner's comments as to a lack of remorse for his crime, such a report would be of aid in sentencing Suggs. (S. 20-21) At no point did petitioner or his attorney or any other person suggest or imply that Suggs was incompetent to enter his plea. Indeed, petitioner specifically admitted to and even volunteered all of the pertinent factual details of his crimes and then twice indicated that he wished to plead guilty (p. 10-16). The implicit opinion of petitioner's attorney as to his ability to understand the nature of the pleadings "is indeed significant and probative" and should not simply have been ignored by the District Court. See U.S. ex rel. Roth v. Zelker, 455 F. 2d 1105 (2d Cir. 1972) at 1108, cert den. sub. nom. Roth v. Zelker, 408 U.S. 927 (1972).

Notwithstanding the instructions of the court and notwithstanding the fact that neither petitioner nor his attorney ever remotely expressed a desire to enter an incompetency defense, the two psychiatrists who examined Suggs made the conclusion that he was

"incapable of understanding the charge, proceedings or making his defense".

The District Court took this conclusion literally and reasoned that it and the subsequent order of the New York State Supreme Court outlining Suggs' commitment provided conclusive evidence of petitioner's insanity at the time of his plea. However, this view completely overlooks a far less drastic and decidedly more plausible alternative conclusion --- namely that all parties involved understood the sense of the report as directed to the sentencing proceeding rather than any proceedings which preceded it (See Opinion of the New York County, Supreme Court, cited at p. 12). In short, the report was not directed to the unraised issue of Suggs' competency at the time of his plea but, rather, was viewed as a vehicle to avoid petitioner's commitment in a correctional facility.

Consonant with this is the fact that the District Attorney made no effort to challenge the report. This would have been the logical thing for him to do had the report carried the meaning which the lower court ascribed to it. Interestingly,

the court which later sentenced Suggs, with no objection from either Suggs or his attorney, also treated the report as if it did not negate the plea.

As for the report itself, there is no question that its formal conclusion involves a word-for-word copying of the then applicable New York legal incompetency standard as set forth in § 658 of the Code of Criminal Procedure, to wit, that a defendant is not fit to proceed if he "is in such state of idiocy, imbecility or insanity that he is incapable of understanding the charge, indictment or proceedings or of making his defense". See People v. Rhinelander, 2 N.Y. Cr. 335, 346 (1884). However, in view of the specific use intended for the report by the plea court it seems probable that this boilerplate conclusion was set forth merely because there was no other linguistic avenue available to express the legal import of defendant's post-plea medical condition. In any event, as noted, supra, the conclusion is directly confuted by another psychiatric report on Suggs made ~~less than~~ two months previously.

Even assuming that petitioner was literally incapable of "understanding the charge, proceedings, or making his defense", this conclusion was valid only with respect to petitioner's state of mind at the time of the report -- that is, his state of mind

approximately five weeks after the entry of his plea. Although the lower court deemed this argument "transparent sophistry" (Appendix "B", p. 10), given the unique circumstances of this case it is hardly that. Suggs' competency appears to have undergone wide gyrations in very short periods of time. When he entered his plea he appeared to be completely rational and did not even raise the competency issue. ^{less than} this was also the conclusion of a psychiatric report made ~~two months~~ prior to the plea; however, five weeks later he was diagnosed as a "paranoid schizophrenic"; some five months later he was once again determined to be competent after separate examinations by physicians at Matteawan and at the Psychiatric Clinic of the New York Court, Supreme Court; thereafter, at the time of his sentencing he appeared to be fully rational and in command of his senses. Thus the five week interval between the time of the plea and the report may very well have been critical. Indeed, in view of the fact that the report is the only evidence in the record of Suggs' incompetency, a reasonable inference can be made that Suggs may have been a malingeringer.

Plainly, there was no rational factual foundation for the holding of the district court. Indeed in arriving at its expansive and unprecedental legal conclusions involving the Pate (e.g., Pate v. Robinson, 383 U.S. 375 [1966]) and Boykin decisions

(See Parts B and C, infra), Judge Duffy summarily ignored a factual conclusion by the New York Court, Supreme Court (Sandifer, J.), reached during a recent review of the same record, that petitioner was fully competent to enter his 1968 plea. This conclusion was certainly entitled to a strong presumption of correctness.* See 28 U.S.C. § 2254(d); LaVallee v. Delle Rose, 410 U.S. 690 (1973). At the very least, prior to negating this presumption, the District Court should have held an evidentiary hearing (See Point II, infra).

B. Even if the report negated the plea, it did not, in view of Suggs' subsequent actions, negate the admissions on which the plea was founded.

Even if it is true that the report nullified petitioner's plea, it certainly does not follow that at a subsequent time when the now competent petitioner expressed a firm intent to ratify his earlier plea, the presiding judge should have treated the situation as if there is a blank record and then make a fresh inquiry into the background of petitioner's plea. Obviously, in view of the earlier admissions, the court might reasonably have concluded that such an exercise would have been redundant and a total waste of judicial time. Moreover, in view of the

* Interestingly, Judge Sandifer reached his conclusion without even considering the two psychiatric reports of July 31, 1968 and May 30, 1969, both indicating that Suggs was able to understand the proceedings against him. There reports as already noted (ftn. p. 8) are presently the subject of a motion to amend the record before this Court.

extensive nature of his indictments, and the large potential sentences he faced if convicted after trial, Suggs' decision to waive his rights can hardly be deemed an irrational one; indeed, having merely raised and then quickly dropped the issue of his incompetence, the petitioner displayed an almost eager interest in having the Court proceed to sentencing (S. 4-5).

In the connection, the lower court has placed a mistaken emphasis on the meaning of Pate v. Robinson, 383 U.S. 375 (1966) (Appendix "B", p. 8). In fact, the case is wholly distinguishable from the present proceeding.

In Pate, the competency issue arose within the context of a trial that was held despite defendant's requests for a sanity hearing and despite ample evidence that such a hearing was indeed justified. Only under such circumstances was a subsequent finding of incompetence held to vitiate defendant's conviction (id., 383 U.S. at 384-385). The case certainly did not hold and cannot be construed as holding that a guilty plea by an outwardly competent defendant is automatically, without regard to attendant circumstances and other factual evidence, rendered null and void by a subsequent, unolicited psychiatric finding as to the defendant's incompetency at the time of his plea.

Indeed, Pate simply did not reach this issue.* The limited case law that does exist with respect to such a situation suggests that the plea must be evaluated upon a consideration of all the pertinent facts -- not merely one particular psychiatric finding that is favorable to a defendant (sic, petitioner). See, analogously, United States ex rel. Roth v. Zelker, cited supra, p. 16; also, United States ex rel. Curtis v. Zelker, 466 F. 2d 1092 (2d Cir., 1972), cert. den. 410 U.S. 945 (1973).** Thus, at most petitioner's 1968 plea was rendered voidable subject to his

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* This reality is underscored by the recent holding of the Supreme Court in Drope v. Missouri, ___ U.S. ___ (Feb. 19, 1975), 95 S. Ct. 896. Discussing the significance of the Pate case, the court noted pertinently (*id.*, 904):

"In Pate v. Robinson, 383 U.S. 375 (1960)... we held that the failures to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial."

In contrast, in the present proceeding, it is clear that there has been no failure about observing adequate examination procedures; the issue is rather the probative force of such psychiatric examinations as were actually conducted.

It also should be noted that Drope, like Pate, is inapposite here since it dealt with a failure to provide a competency examination despite evidence such an examination was necessary.

** It may be argued that in these cases, unlike the present proceeding, the initial psychiatric assessment of the respective petitioners found them to be competent and that the trial courts then acted accordingly. However, the more important point is that in each case, a later court, in reviewing a claim by petitioners that they were actually incompetent, undertook a balanced assessment of all the available evidence, including any testimony or reports in support of petitioners' respective claims. As we indicate supra, this is precisely what should have been done here.

later intentions. Since these intentions were so plainly and unequivocally expressed on June 6, 1969, at a time when petitioner was admittedly competent, it was plainly erroneous for the lower court to ignore them and instead substitute its own judgment. (See Point C, infra).

C. Regardless of the import of the psychiatric report, petitioner's statements on the record constitute a full and complete waiver of his constitutional rights.

A reasonable reading of the record clearly and uncontroversably indicates that regardless of the legal significance attached to the 1968 psychiatric report, petitioner's actions thereafter can only be viewed as a full, deliberate, and voluntary waiver of his constitutional rights. Cf. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Johnson v. Zerbst, 304 U.S. 458 (1938).

At the outset it should be noted that the lower court has applied an incorrect legal standard to the record.

In the first place, Judge Duffy incorrectly concluded that petitioner's plea must be measured by the "intelligent and voluntary" standard enunciated in the Boykin case (395 U.S. at 242) rather than the more lenient, "totality of the circumstances" test that applied prior to the Boykin decision. See, e.g., United States ex rel. Rogers v. Adams, 435 F. 2d 1372

(2d Cir. 1970), cert. den. 404 U.S. 834, reh. den. 404 U.S. 996 (1971); United States ex rel. Brown v. LaVallee, 424 F. 2d 457 (2d Cir. 1970). The lower court reasoned that petitioner's initial plea, which had been entered approximately nine months prior to the Boykin decision, had been absolutely voided by the psychiatric report, and that, accordingly, the only viable plea was the one entered June 6, 1969, four days after the applicable date of Boykin. See Rogers, op cit, 435 F. 2d at 1374, noting that Boykin applied prospectively, to pleas entered after June 2, 1969. However, what this overlooks is that on June 6, 1969, petitioner explicitly revived his earlier plea by stating twice that he did not wish to withdraw it. Thus, although in a strictly technical sense petitioner was entering a plea on June 6, 1969, in reality his significant actions -- the one which have a critical bearing on this case -- date back to September 13, 1968.

Apart from this, the court misconstrues the meaning of what constitutes an "intelligent and voluntary waiver" by suggesting that the words require an explicit renunciation of three constitutional rights: the privilege against self-incrimination; the right to a trial by jury; and the right to confront

one's accusers (see Appendix "B", pp. 11-12). In fact, although reciting these three rights in its opinion, the Boykin court did not indicate whether a waiver of them could be implicit or explicit. Rather, with reference to the facts of the case before it, the Court observed that "we cannot presume a waiver of these three important federal rights from a silent record" (id., 395 U.S. at 243). Interestingly, the court did not appear to require state courts to follow the explicit pleading requirements laid down in Rule 11 of the Federal Rules of Criminal Procedure, Boykin, 395 U.S. at 243, fn. 5, referring to McCarthy v. United States, 394 U.S. 459, 464, 467, 472 (1969). Moreover, in a subsequent case, the Court, on the basis of independent evidence not contained in the plea minutes, permitted a guilty plea to stand in which defendant had made a collateral protestation of his innocence. See North Carolina v. Alford, 400 U.S. 25 (1970).

Thus, it would appear that the Court has avoided requiring the sort of rigid, mechanistic approach to plea taking that is suggested by the lower court opinion and, instead, permitted a reasonable degree of leeway and inference, provided that the record is not wholly devoid of any rationale for the plea. Although this issue has not yet been resolved within this circuit (See e.g., U.S. ex rel. Hill v. Ternillo, ____ F. 2d ____ (2d Cir. Feb. 10, 1975), docket no. 74-2351), the approach suggested by

the Alford case has been endorsed by decisions in a vast majority of courts in other circuits. See, e.g., Wade v. Coiner, 468 F. 2d 1059, 1060 (4th Cir. 1972); U.S. v. Frontero, 452 F. 2d 406, 412-415 (5th Cir. 1971); Todd v. Lockhart, 490 F. 2d 626, 627 (8th Cir. 1974); Stinson v. Turner, 473 F. 2d 913, 916 (10th Cir. 1973),* specifically rejecting the more narrow reasoning of the California Supreme Court in In Re Tahl (460 P. 2d 449, 456-458 [1969]).

In the present proceeding, it is clear that petitioner at the time of his 1969 sentencing, deliberately ratified his admissions made nine months previously. Cf. U.S. ex rel. Callahan v. Follette, 418 F. 2d 903 (2d Cir. 1969), cert. den. 400 U.S. 840 (1970), a post-Boykin case in which claimant's deliberate failure to make a written motion to withdraw his guilty plea was held to constitute a waiver of the right to withdraw the plea.** Thus, assuming that the 1969 and 1968 minutes must be read together in

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* The District Court incorrectly notes that the Tenth Circuit has endorsed the explicitness approach. In fact, the decision, cited by the court, Moore v. Anderson, 474 F. 2d 1118, 1119 (10th Cir. 1973), merely follows the decision in Stinson, supra.

** The District Court attempted to distinguish this case by noting that it involved a claim of an unfulfilled sentencing promise rather than a question of competency and, as such, the burden of proof was on the defendant. However, the more important point is that in the present case, as in Callahan, defendant had an opportunity to withdraw his guilty plea and deliberately failed to do so. This precludes him from raising his present claim.

order to determine if there has been a proper waive, it is clear that even under Boykin there is a more than ample factual basis for petitioner's plea; it is also clear that petitioner fully understood the nature of the crime with which he was charged. Thus, Suggs has implicitly waived the three constitutional rights required by Boykin and cannot now claim that his plea was not intelligently or voluntarily made. Id. 395 U.S. at 242; Cf. Schneckloth and Johnson cases, supra, p. 21.

POINT II

AT THE VERY LEAST, THE LOWER COUPT COMMITTED REVERSIBLE ERROR BY NOT HOLDING AN EVIDENTIARY HEARING.

Apart from the serious questions as to the accuracy of the lower court's legal conclusions it is clear, as already noted, that these conclusions are bottomed on an ambiguous and oftentimes contradictory factual record. Thus, de minimis, Judge Duffy committed reversible error by not holding an evidentiary hearing prior to issuing his opinion. See, analogously LaVallee v. Delle Rose, 410 U.S. 690 (1973); Townsend v. Sain, 372 U.S. 293 (1963); United States ex rel. Robinson v. Zelker, 468 F. 2d 159 (1972), cert den. 416 U.S. 939 (1973); Mancusi v. U.S. ex rel. Clayton, 454 F. 2d 454 (2d Cir. 1972), cert den. sub

nom. Montanye v. Clayton, 406 U.S. 977 (1972).

Plainly, there are serious, unresolved questions of fact as to the significance to be ascribed to the psychiatric report. As against the boilerplate conclusion reported therein, there are the unequivocal statements of both the court and Suggs' attorney that the report was to be a vehicle for sentencing only as well as an earlier report indicating that Suggs was indeed competent (see supra, pp. 16-19). Clearly the testimony of Suggs, his attorney, the Assistant District Attorney, and the psychiatrists involved in the report would have been germane in this regard.

Moreover, even assuming the report does establish the invalidity of the plea, there is a further question as to Suggs' state of mind at the later occasion on which he ratified the admissions involved in the plea. This would involve testimony as to any conferences between petitioner and his lawyer as well as between his lawyer, the court, and the district attorney, which influenced petitioner not to raise the issues that are now set forth herein.* Obviously, if petitioner did understand that he

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* As already noted, supra, pp. 20-21, the lower court ignored this question because it viewed all of the proceedings involved in the plea as null and void. However, this approach involved a clear misreading of the import of the Pate case.

was ratifying his 1968 plea, it would have been redundant for the court to duplicate what can only be deemed an adequate record. Indeed, this would have exalted form over substance.

POINT III

THE LOWER COURT PROPERLY HELD THAT PETITIONER WAS NOT ENTITLED TO A NEW COMPETENCY HEARING PRIOR TO HIS 1969 PLEA RATIFICATION AND SENTENCING.

Petitioner argued in his original pro se application to the District Court that the sentencing court, sua sponte should have ordered a new inquiry into the question of his competency. However this claim was quite properly refuted by Judge Duffy.

At the time of his sentencing petitioner had been certified as sane by the physicians at the state mental hospital to which he had been committed following the adoption of the 1968 psychiatric report. In addition, petitioner himself raised no question as to his present incompetency. In view of this, it would have been absurd for the court on its own initiative to have ordered a competency hearing. Indeed, as this Court aptly observed in United States ex rel. Evans v. LaVallee, 446 F. 2d 782 (2d Cir. 1971) at 786:

"We do not understand Pate (e.g.,
Pate v. Robinson, 383 U.S. 375 [1966])
to mean that a trial court must always
hold a sanity hearing, on its own
motion, no matter what the evidence is
and regardless of whether or not a
defendant requests one."

See also O'Neil v. United States, 486 F. 2d 1034 (2d Cir. 1973);
United States ex rel. Roth v. Zelker, cited supra, p. 16; United
States ex rel. Kaye v. Zelker, 355 F. Supp. 1002, 1007-1008
(S.D.N.Y. 1973), affd. 474 F. 2d 1336 (2d Cir. 1973).

CONCLUSION

THE JUDGMENT OF THE LOWER COURT
SHOULD IN ALL RESPECTS BE REVERSED
AND PETITIONER'S HABEAS CORPUS
APPLICATION SHOULD BE DISMISSED.

Dated: New York, New York
April 10, 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-
Appellant

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DAVID R. SPIEGEL
Assistant Attorney General
of Counsel

Appendix "A"

PRO SE

PRO SI

JUDGE DUFFY

HARVEY SINGER

72 CV. 433

DATE	PROCEEDINGS	DATE Order Judgment
Oct. 13-72	Filed Petition for writ of habeas corpus and affdvt.	
Oct 13-72	Filed Order premitting petitioner to proceed in forma pauperis without prepayment of fees.	POLLACK, J.
Nov 2-72	Filed defts affidavit by Stanley L. Kantor in opposition.	
Nov. 27-72	Filed Notice of Assignment to Judge Pierce.	
6-15-73	Filed deft's. supplemental memorandum in opposition to pltf's. application for habeas corpus relief.	
Jun. 26-73	Filed petitioner's attorneys notice of appearance.	
Aug 16-73	Filed stip and order that this action be placed on the suspense calendar until such time as petitioner properly exhausts his state remedies on the issue of his mental competency. So Ordered Duffy J. m/n	
Apr. 19-74	Filed petitioner's affdvt. of Judson A. Parsons, Jr. and notice of motion for an order to remove action from suspense calendar and for leave to file supplemental petition. Ret. 4-30-74.	
May 17-74	Filed memo endorsed on motion filed 4-19-74. Motion granted. So ordered- DUFFY, J. (m/n)	
May 31-74	Filed respondent's affdvt. of David R. Spiegel in opposition to petitioner's supplemental application for habeas corpus relief.	
June 11-74	Filed petitioner's memorandum in reply to respondent's affdvt. in opposition.	
Feb. 25-75	V Filed Opinion # 41945- for the reasons stated, petitioner's plea of guilty is vacated, and the writ of habeas corpus shall issue sixty days from the date of this opinion, unless within that time petitioner is allowed to re-plead in the State court upon the indictments in question. DUFFY, J. (m/n) <i>(C70 B)</i>	
Mar 24-75	Filed defts notice of appeal from the decision of J. Duffy.	

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

M. Raymond
Deputy Clerk

Appendix "B"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Office of the Clerk
United States Court House
Foley Square
New York, N.Y. 10007

JOHN SUGGS
135 State Street
Auburn N.Y. 13021

DATE. Feb 26, 1975

TITLE : U.S.A. ex rel JOHN SUGGS vs. J.E. LAVALLEE
POCKET NUMBER: Pro Se 72 Civ 4336
Superintendent Clinton
Correctional Facility

DECISION DATE: FEB 25, 1975

JUDGE • Duffy

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THERE IS ENCLOSED HEREBY A COPY OF PLEA WHICH
FILLED AND ENTERED IN THE ABOVE-ENTITLED PROCEEDING.

c.c.
Judson A PARSONS
140 Broadway
N.Y., N.Y. 10005

卷之三

THE STATE SURVEYOR

LOUIS J. LEFKOWITZ
ATTORNEY GENERAL
STATE OF NEW YORK
ATTN STANLEY KANTOR
Two World Trade Center
New York, N.Y. 10047

Mr. Joel Blum
Deputy Pro. to Clerk

The Supreme Court in Boykin specifically enumerated that among the rights waived by a defendant who pleads guilty are the constitutional rights to a jury trial, confrontation by his accusers, and the privilege against self-incrimination. 395 U.S. at 243. The Court stated that waiver cannot be presumed from a silent record, holding that the prerequisites of a valid waiver must appear on the record:

"It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary."

Id., at 242

The question of how explicitly a defendant must be shown to have waived these rights is, however, not susceptible of clear-cut definition. While several circuits have held that the record need not reflect that the waiver of the three constitutional rights enumerated in Boykin need be explicit, Wade v. Coiner, 468 F.2d 1059 (4th Cir. 1972); Winters v. Cook, 489 F.2d 174 (5th Cir. 1973) (en banc); Todd v. Lockhart, 490 F.2d 626 (8th Cir. 1974); other circuits have held that there must be an affirmative showing of explicit waiver, Coleman v. Burnett, 477 F.2d 1187 (D.C. Cir. 1973);

Sieling v. Eyman, 478 F.2d 211 (9th Cir. 1973); Moore v. Anderson, 474 F.2d 1118 (10th Cir. 1973).

While this Circuit has not yet specifically ruled on the question, it has seemingly indicated sympathy with the latter interpretation in United States ex rel. Curtis v. Zelker, 466 F.2d 1092, 1102 (2d Cir. 1972), cert. denied, 410 U.S. 945 (1973), wherein the Court stated in dictum that the states would appear to have imposed upon them the requirements of demonstrating voluntariness consonant with Rule 11, F.R.Cr.P. by Boykin.* However, the Court declined to so rule on that occasion on the ground that the guilty plea in question predated Boykin, and the Circuit had previously held it to be non-retroactive. United States ex rel. Rogers v. Adams, 435 F.2d 1372 (2d Cir. 1970), cert. denied, 404 U.S. 834 (1971).

The facts of the instant case throw the question of non-retroactivity of Boykin into sharp relief, for, while the initial plea occurred some nine months before that decision, the sentencing took place four days afterward. Thus, given the previous incompetency of petitioner, rendering his

* Cf., United States ex rel. Hill v. Ternullo, ___ F.2d ___, (74-2351, 2d Cir. 2/10/75) at 1756, fn.1.

guilty plea a nullity, this Court must apply Boykin standards in determining whether the purported ratification at sentencing of the earlier plea sufficiently rehabilitated it in order for it to remain valid.

Inspection of the sentencing minutes reveals a complete absence of any meaningful inquiry into the voluntariness of petitioner's earlier plea. The sentencing court's sole inquiry was directed to the question of whether petitioner wished to withdraw his earlier plea. Upon the defendant's acquiescence in the earlier plea, the court proceeded without any further inquiry of its own into the original plea's voluntariness or the voluntariness of a now-competent defendant's ratification of a plea made when he was incompetent. No inquiry whatever was made of petitioner at any time during which he was competent as to whether any promises had been made to him, whether he had been coerced, whether he was acting under his own free will either with respect to his invalid plea or his decision not to withdraw it.

Moreover, no inquiry was made of the defendant, now that he was competent, as to whether there was a proper factual basis for his plea. United States ex rel. Dunn v. Casscles, 494 F.2d 397 (2d Cir. 1974); McCarthy v. U.S., supra.

Respondent argues that petitioner's waiver of the opportunity to make a motion to withdraw his plea at the time of sentencing operates as both a ratification of the earlier plea and a waiver of his objections to that plea's voluntariness, citing United States ex rel. Callahan v. Follette, 418 F.2d 903 (2d Cir. 1969), cert. denied, 400 U.S. 840 (1970).

Such an argument is plainly untenable upon the facts of this case. Callahan concerned a guilty plea, valid on its face, that was being attacked upon the grounds of unfulfilled promises by either the court or the prosecution, a situation in which the defendant clearly has the burden of proof. Callahan was held to have waived any objection to his plea by his failure to take the opportunity afforded by the court for a formal motion and determination of his request for withdrawal.

Furthermore, respondent's suggestion that the 1968 plea minutes in this case be read in conjunction with the 1969 sentencing minutes clearly flies in the face of both Pate v. Robinson, supra, and McCarthy v. United States, supra.

It is manifest that where a defendant has been remanded for a competency examination immediately after pleading guilty, and is subsequently found incompetent to

stand trial, such a plea must be considered null and void, and upon the attainment of competency, he must be given an opportunity to re-plead to the charges.

Furthermore, should the trial court, alternatively, wish to provide a newly-competent defendant an opportunity to ratify his earlier plea, a full and complete inquiry must be made by the court on that later occasion to determine the voluntariness of that ratification, the voluntariness of the plea itself, and further inquiry must once again be made of the now-competent defendant as to whether there is a proper factual basis for the plea.

Applying these principles to the instant facts, it is manifest that no such inquiry as to the voluntariness of the ratification, the plea itself, or any factual inquiry was made of the defendant at the time of sentencing. Thus, if the 1968 plea is deemed a nullity by virtue of defendant's incompetence, the court must look to the sentencing minutes, which are utterly inadequate to make any finding of waiver of rights, pursuant to Boykin.

In attempting to fashion the appropriate remedy in this case, the Court is not unmindful of the fact that in most cases a hearing may be held by the District Court in an attempt to cure the defects of the plea. U.S. ex rel. Leeson v. Damon, supra; Green v. Wingo, 454 F.2d 52, 5 (6th Cir. 1972).

However, a hearing is not always mandated, and there is authority for the Court to hold that an inadequate record alone may justify relief from a guilty plea, Stinson v. Turner, 473 F.2d 913 (10th Cir. 1973); Perry v. Crouse, 429 F.2d 1083 (10th Cir. 1970). This would appear to be the wiser course in this case, dealing as we are with a void guilty plea and a grossly inadequate post-Boykin attempted ratification of that plea. The holding of a hearing in this case in order to flesh out a virtually non-existent record would be an exercise in futility. Rather, petitioner should be given the opportunity, albeit belated, to properly re-plead to the indictments in question.

In light of the foregoing disposition, it is unnecessary for me to decide whether, under any and all circumstances, the failure of a sentencing court to hold a competency hearing, sua sponte, where none has been requested, and where the record at the time of sentencing did not indicate that the petitioner was manifesting any psychiatric symptomatology, violated due process.

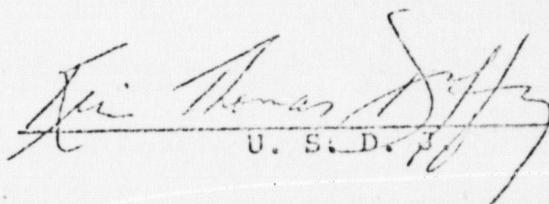
Suffice it to say, Pate v. Robinson, supra, does not mandate a competency hearing regardless of the evidence and whether or not the defendant requests one. United States ex rel. Evans v. LaVallee, 446 F.2d 782 (2d Cir. 1971);

United States ex rel. Roth v. Zelker, 455 F.2d 1105 (2d Cir.), cert. denied, 408 U.S. 927; United States ex rel. Curtis v. Zelker, supra.

Upon careful scrutiny of this record as well as petitioner's failure to particularize in what way he was prejudiced by this omission, the sentencing court's refusal to hold a competency hearing, sua sponte was well within the proper exercise of its discretion.

Accordingly, petitioner's plea of guilty is vacated, and the writ of habeas corpus shall issue sixty days from the date of this opinion, unless within that time petitioner is allowed to re-plead in the State court upon the indictments in question.

The Court wishes to express its appreciation to Judson A. Parson, Jr., Esq., assigned counsel, for his assistance in this case.



U. S. D. J.

Dated: New York, New York

February 25, 1975.

APPENDIX

The Court: You are not sorry at all that you did any of these things, Mr. Suggs?

The Defendant: Nothing to be sorry about.

The Court: What?

The Defendant: There is nothing to be sorry about.

The Court: Nothing to be sorry about? Well, what in your opinion would be something to be sorry about? If you did what? If what happened?

The Defendant: If I did something and I did it there is nothing to be sorry about after I do it.

The Court: No matter what you do?

The Defendant: No matter what I do.
(Plea minutes, pp. 17-18).

The Court: Well, don't you think it might help you if you show that you are sorry, you show compassion for your victims?

The Defendant: I tried that once.

The Court: What?

The Defendant: I tried that once.

The Court: You tried that once? When was that?

The Defendant: When I was small.

The Court: What happened when you were small?

The Defendant: I lost a finger because I tried.

The Court: You lost a finger you say?

The Defendant: Part of it.

APPENDIX - continued

The Court: What happened then?

The Defendant: That's when I did something when I had a fight with my sister. I wanted to show my mother I was sorry. Instead of showing her I was sorry, she cut me.

The Court: Who tried to cut you, your mother or your sister?

The Defendant: My mother.
(Id. at pp. 19-20).

The Court: We are going to have the doctors look at you, Mr. Suggs. They may be able to help you in some way because there is something wrong with you, apparently. You seem to be --- whom are you mad at?

The Defendant: No one.
(Id. at p. 21).

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ROSALIN FANN , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for Appellant
herein. On the day of April , 1975 , she served
the annexed upon the following named person :

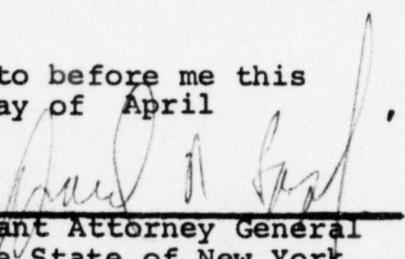
JUDSON A. PARSONS, JR.
c/o Dewey, Ballantine, Bushby,
Palmer, Wood, Esqs.
140 Broadway
New York, N.Y. 10005

Attorneys in the within entitled action by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by the
Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorneys at the
address within the State designated by them for that
purpose.



RODALIN FANN

Sworn to before me this
15th day of April , 1975



Assistant Attorney General
of the State of New York

